(1)

83-1976

No. .....

Office - Supreme Court, U.S.
FILED
JUN 1 1984
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

—o—

JOHN E. COYNE,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, TWELFTH APPELLATE DISTRICT, CLERMONT COUNTY, OHIO

—o—

ANDREW B. DENNISON
200 Main Street
Batavia, Ohio, 45103
(513) 732-6800

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

61 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the conduct of a prosecuting attorney constitutes misconduct denying the petitioner his right to fair trial repugnant to the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, where, in closing argument before a jury, comment is made on the petitioner's exercise of his Fifth and Sixth Amendment rights and comment on matters which were not evidence in the case and which was designed to prejudice petitioner.

II.

Whether the felonious assault crime in the state of Ohio, which requires the mental culpability state of "knowingly," defined, in pertinent part, as "regardless of purpose," and as instructed by the trial court to the jury, mandates that the jury disregard petitioner's "purpose" in his defense of self-defense, which shifts from the prosecution its burden of proof beyond a reasonable doubt of criminal intent and imposed upon the petitioner the burden to prove his self-defense beyond a reasonable doubt, or at a minimum by a preponderance of evidence, as to his "purpose" of defending himself, as being repugnant to due process of law vested by the Fifth and Fourteenth Amendments of the Constitution of the United States.

III.

Whether the verdicts of the jury were inconsistent in the acquittal of petitioner for the state crime of murder but in finding petitioner guilty of two counts of the state crime of felonious assault, as a lesser included offense of

attempted murder, and were repugnant to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, where the evidence established that petitioner, a property owner, guarding his business property at night, was confronted by three thieves on his property in the dark and, to stop the advance of the three intruders toward petitioner, he discharged a firearm toward the intruders in which one is killed and the other two receive injury from debris and not gunshot, and the self-defense justification for killing one thief is transferred to the two thieves sustaining injury, as a transferred innocent intent, requiring acquittal following the verdict as to the murder charge.

PARTIES TO THE PROCEEDINGS BEFORE THE COURT OF APPEALS, TWELFTH APPELLATE DISTRICT, CLERMONT COUNTY, OHIO

The caption of the case in this court contains the names of all parties.

TABLE OF CONTENTS

	Pages
Questions Presented For Review	i
Parties to the Proceedings Before the Court of Appeal, Twelfth Appellate District, Clermont County, Ohio	iii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Reasons For Granting The Writ	13
Argument	14
Conclusion	24

TABLE OF AUTHORITIES

CASES:

Berger v. United States, 295 U.S. 78 (1935)	15
Cole v. Arkansas, 333 U.S. 196 (1948)	23
Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1982)	20
Erwin v. State, 29 Ohio St. 186 (1876)	19
Escobedo v. Illinois, 378 U.S. 478 (1964)	17
Gregory v. City of Chicago, 394 U.S. 111 (1969)	23
Griffin v. California, 380 U.S. 609 (1965)	17
In Re Winship, 397 U.S. 358 (1970)	20
Isaac v. Engle, 646 F.2d 1129 (6th Cir., 1980)	19
Marts v. State, 26 Ohio St. 162 (1875)	19
Miranda v. Arizona, 384 U.S. 436 (1966)	17
Mullaney v. Wilbur, 421 U.S. 684 (1975)	21

TABLE OF AUTHORITIES—Continued

Pages

State v. Agner, 30 Ohio App.2d 96, 283 N.E.2d 443 (1972) 16

State v. Clifton, 32 Ohio App.2d 284, 290 N.E.2d 921 (1972) 20, 23

State v. Hill, 52 Ohio App.2d 393, 370 N.E.2d 775 (1977) 16

State v. Melchior, 56 Ohio St.2d 15, 381 N.E.2d 195 (1978) 19

State v. Muskin, 158 Ohio St. 276, 109 N.E.2d 15 (1952) 16

State v. Poole, 33 Ohio St.2d 18, 294 N.E.2d 888 (1973) 19

State v. Robbins, 58 Ohio St.2d 74, 388 N.E.2d 755 (1973) 19

State v. Stephens, 24 Ohio St.2d 72, 263 N.E.2d 773 (1970) 16, 17

State v. Thayer, 124 Ohio St. 1, 176 N.E.2d 656 (1931) 17

United States v. Brinson, 411 F.2d 1057 (6th Cir., 1969) 16

United States v. Nolan, 416 F.2d 588 (10th Cir., 1969) 16

CONSTITUTIONAL PROVISIONS:

Fifth Amendment of the Constitution of the United States 3, 12, 14, 17, 18

Sixth Amendment of the Constitution of the United States 3, 12, 14

Fourteenth Amendment of the Constitution of the United States 3, 12, 14, 15, 18, 21, 23

TABLE OF AUTHORITIES—Continued

Pages

STATUTES:

Section 2901.05, Revised Code of Ohio 3
Section 2901.21, Revised Code of Ohio 3, 20
Section 2901.22, Revised Code of Ohio 3, 18, 21
Section 2903.02, Revised Code of Ohio 3, 18
Section 2903.11, Revised Code of Ohio 3, 18, 21
28 U.S.C. Section 1257(3) 3

No. _____

—o—

In The

Supreme Court of the United States

October Term, 1983

—o—

JOHN E. COYNE,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, TWELFTH APPELLATE DISTRICT, CLERMONT COUNTY, OHIO

—o—

OPINIONS BELOW

The orders of the Supreme Court of Ohio overruling petitioner's motion to certify the record and dismissing petitioner's appeal as of right are unreported and set forth herein as Appendices A and B, respectively. The

opinion of the Court of Appeals, Twelfth Appellate District, Clermont County, Ohio, affirming the conviction of petitioner is unreported and set forth herein as Appendix C. The Judgment Entry on Jury Verdict; the Entry Denying Motions; and the Entry Sentencing Defendant of the Court of Common Pleas, Clermont County, Ohio, are unreported and set forth herein as Appendices D, E and F, respectively.

JURISDICTION

The Court of Appeals, Twelfth Appellate District, Clermont County, Ohio, affirmed the judgments and sentence of the Court of Common Pleas, Clermont County, Ohio, on September 30, 1983. The Supreme Court of Ohio refused to accept petitioner's appeal and dismissed the motion for leave to appeal and the appeal as of right on April 4, 1984.

The jurisdiction of this Court is founded upon the presence of federal questions governed by the Constitution of the United States as a continuity of state appellate review to provide procedural and substantive due process safeguards within the state of Ohio's criminal justice system. The issues raised for review range from prosecutorial misconduct, in jury comment within the spectrum from statements not contained within the evidence to comment upon petitioner's right to remain silent and to confer with counsel, to burden shift upon such fundamental concepts of criminal intent under state law clashing with the historical right of self-defense and inconsistency of verdicts

implicating the transfer of innocent intent. Each issue complements the other to establish a clear demarcation from essential due process of law concepts protected by the Constitution.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) and Part V of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and pertinent provisions of the Fourteenth Amendments of the Constitution of the United States are set forth in Appendix G. Sections 2901.05, 2901.21, 2901.22, 2903.02, 2903.11 and 2923.02, Revised Code of Ohio, are set forth in Appendix H.

STATEMENT OF THE CASE

Petitioner John E. Coyne is the owner and operator of a scrap metal and salvage business situated on Twelve Mile Road in Clermont County, Ohio. The business premises consist of 56 acres, fenced, lighted and with a small office housing tools, portable radios and other equipment. The premises contain large machinery, scrap, crushed vehicles, discarded vehicles and various metals.

Over a period of years petitioner had experienced several thefts. He had employed night watchmen to appre-

hend thieves and experimented with lighting the premises at night without success in deterring inventory and equipment loss. On only one occasion were the police successful in apprehending the thief and recovering the stolen property.

Approximately two months before August 28, 1981 petitioner commenced guarding his property at night to protect against thefts. On August 28, 1981 he was asleep in a closed truck. He kept with him a Heckler and Kock .308 caliber semi-automatic rifle and a Mauser .380 caliber pistol. The rifle was equipped with a 20-cartridge magazine and the handgun with a seven-round clip.

Philip Osborne, age 18, deceased, Leslie Oberschlake, age 16, and Anthony Dodson, age 16, around 6:30 to 7:00 p.m. visited a friend until approximately midnight on August 27, 1981. While at the friend's house the trio drank Little Kings Ale and smoked marijuana. After leaving the friend's home the three elected to go to petitioner's business premises to steal a tire and wheel. Enroute they smoked more marijuana.

The three arrived at petitioner's business and Osborne backed his automobile into a lane paralleling the front fence of the business premises and parked the car. The three crawled under the east gate of petitioner's fence and in four or five trips gathered radiators and batteries and placed them at the gate. They crawled under the gate and carried the items to the vehicle placing the batteries in the trunk and the radiators in the back seat.

The night was dark, misting rain, foggy and neither natural nor artificial light was present.

Petitioner was awakened by what he thought was the sound of a footstep on gravel and he heard muffled voices. He was sleeping in white long underwear and being concerned that he would be detected by what he assumed to be intruders, he dressed as quickly and as quietly as possible. He took with him from the truck the rifle, handgun and a flashlight. Petitioner proceeded to his office, inspected the door and lock, found them to be intact, and carefully, fearing detection, illuminated the flashlight briefly into the office to satisfy himself that his tools and equipment had not been stolen.

Petitioner proceeded east toward the area where he thought he heard noises. As he proceeded eastward the trio had reentered the premises and were walking in a southwesterly direction. The time was approximately 12:30 a.m.

At a substantial distance from the gate there was an area containing an air compressor, cable and several barrels filled with debris. As the three came into the air compressor-barrel area the petitioner was approximately 10 to 20 feet south and slightly west of them. He saw one individual in the lead, followed by two others. He fired a warning shot from the rifle over their heads, followed immediately by the command to stop. The three continued forward and petitioner immediately directed rifle fire toward them to halt the advance. At that point petitioner lost sight of two of the three and did not see the two again until he discovered them later at the Weiner residence, two houses east of his property. Osborne, the lead individual, continued to advance toward petitioner. Petitioner continued to fire the rifle until he had exhausted its

magazine. (At an undetermined point Osborne sustained a rifle wound to his upper right arm.) Osborne advanced a distance of approximately 40 feet south from the initial contact into the premises and toward petitioner. At that point and from a distance greater than eight feet petitioner fired one round from the handgun which fatally struck Osborne. Within approximately four minutes Osborne died. There were no powder burns present on the body.

Petitioner then commenced searching for the remaining two individuals. He first searched around the barrel area where he had last seen them and proceeded from his property where he observed the parked vehicle. He cautiously approached the car and observed blood on the vehicle, concluding that the two individuals were wounded and no longer a threat to him. He returned to his office and telephoned the Sheriff's dispatcher reporting an attempted breaking and entering. The time recorded by the dispatcher was 12:56 a.m. He then telephoned his attorney and requested his presence.

Petitioner commenced searching again for the other two individuals. He heard knocking and approaching the Weiner residence observed Dodson and Oberschlake on the front porch. He noted that they were wounded, advised them to stop pounding and that help had been summoned. He returned to his office, met his attorney and telephoned the Sheriff's dispatcher requesting a life squad. The time recorded for the second call was 1:06 a.m. At approximately 1:08 a.m. the first police officer arrived at the scene.

At 2:30 a.m. a police officer, in the presence of counsel, obtained a recorded statement from the petitioner.

He stated the foregoing events and further stated that in the dark he was unable to discern if the three individuals had weapons. He stated that he first observed them walking between barrels near the air compressor and that it was then, and thereafter, difficult to distinguish forms in the dark. At the approximate location of a fan blade petitioner fired a warning shot, ordered them to stop and, as they advanced, directed fire toward them. At that point he stated that he lost sight of two while the third continued to advance and he continued to direct fire to stop the advance until he had exhausted the 20-round magazine.

Petitioner stated that he was approximately 10 to 20 feet from the group when he first discharged the rifle. He stated that the second shot came moments after the first. He stated that he was not taking account of time or distance, that adrenaline was pumping through his body and that he was in fear for his life with three assailants coming toward him on his property and in the dark. He was concerned about the three being armed and he being outnumbered. Upon discharging the weapon the three dispersed, he couldn't locate two of them and he feared retaliation from the two of whom he had lost visual contact.

On September 1, 1981 petitioner was again questioned by the police in the presence of counsel. He related again the foregoing events. In response to questions he stated that distances continued to vary, that he and the others were in motion, he and they may have stopped at points in time, he lost visual contact at times, he may have retreated, but he didn't know. He didn't think that he remained in one position and felt that his

position must have changed because he was attempting to prevent any retalition by the two of whom he had lost visual contact. Both recorded statements by petitioner were introduced into evidence and presented to the jury.

Dodson and Oberschlake testified that while they were in the barrel area that the ground exploded—one stated that a barrel was blown into two parts: there was no evidence of any explosions or barrels damaged, except for bullet holes—and that they did not see or hear anyone. Each stated that when the "explosions" commenced they fell to the ground and then ran from the property, waited for a period of time at the automobile for Osborne and then proceeded to the residences seeking help. They heard no command to stop, but each admitted that following the first discharge from the rifle that their ears were ringing and they could not hear. Neither Dodson nor Oberschlake sustained a gunshot wound; each was wounded from debris mainly in the front of their bodies. There was no evidence as to the location where they sustained injury. Dodson and Oberschlake were hospitalized, respectively, 16 and 8 days. Each was adjudicated delinquent in a juvenile proceeding for theft.

The physical evidence revealed two patterns, of ten spent casings approximately 34 feet apart. Spent casings from the rifle ejected forward and to the right at a 45-degree angle for a distance of approximately 12 to 19 feet. The first group of casings was near the barrel area, consistent with petitioner's statement that when he first discharged the rifle they were in the barrel area and he was approximately 10 to 20 feet from them: placing petitioner in the area of the fan blade. The sec-

ond group of casings was 32 feet south and slightly west of the first group and a short distance from where the spent Mauser casing was found. This was consistent with the consumption of the rifle magazine, the continuing approach of Osborne, rifle fire directed toward the advancing Osborne; and Dodson and Oberschlake at all time being in that path of fire, and the fatal handgun shot.

Human blood was found in the barrel area, in the location where the fatal shot was fired, from the barrel area to the east gate, on Twelve Mile Road and on the vehicle.

From the east gate to the area of the fatal shot, the deepest point into the property concerning the events, the terrain is a severe incline. All bullet holes in the barrel area were three feet and less from the ground, one bullet hole being found in the fan blade on the ground. The remaining bullet holes, at the greater distance and at a severe descent from the area, and in the direction of fire, were found in a rear fender of a junked automobile near the gate, one bullet hole in the gatepost and two in the gate.

It was determined by police test that the rifle was capable of firing 20 rounds in 13 seconds. The prosecution's firearms expert stated that the weapon was extremely accurate, has a velocity of twenty-seven hundreds feet per second with the ability to penetrate and pass through metal as "a terrific amount of penetration."

Petitioner requested the trial court to grant a judgment of acquittal at the close of the state's case on the basis that the prosecution's evidence had failed to estab-

lish a prima facie case of murder and attempted murder and had, to the contrary, established, as a matter of law, petitioner's self-defense. The trial court denied petitioner's motion.

Petitioner offered two photographs into evidence, did not testify, offered no further evidence and rested his case.

In final argument to the jury, the prosecutor stated that Osborne went into petitioner's property wearing eye glasses (there were no eye glasses on the corpse and police recovered the eye glasses from the driver's side on the dash of the automobile), that Osborne's eyesight was comparable to the prosecutor's and that he, the prosecutor, would not have gone onto the property in the dark without his glasses. He misstated evidence and opined as to what would be general conduct of lighting an area to deter thefts. He continued, stating that petitioner was not present to protect his property but to lure, hunt and punish a thief. The prosecutor misstated that petitioner was required to prove that he was not the aggressor and that he did not provoke the confrontation with full knowledge that the trial court was going to instruct the jury that petitioner was not at fault in creating the situation.

The prosecutor told the jury that the petitioner waited 25 minutes before he called the police, failed to advise that he had killed an individual, and stated that petitioner was acting out a fantasy. Continuing, he stated that the petitioner waited 25 minutes deciding what to do with the body, commenting that the petitioner did not tell the police that the body was there because he was thinking of removing the body, otherwise he would have reported it. The jury was advised that petitioner didn't

report the body in the first call to the police or in the second call, and that his third and fourth statements to the police were made in the presence of, and after consultation with, counsel, followed by: "[we] don't know. They don't answer many questions." He concluded by stating that if the jury found the petitioner not guilty they should elect him sheriff.

Petitioner moved the trial court for a mistrial on the basis of prosecutorial misconduct. The trial judge denied the motion without admonishment to the jury.

At the appropriate point in the court's instruction to the jury petitioner objected to the instruction that petitioner must establish self-defense by a preponderance of evidence and that the burden of proof shift was a denial of due process. The trial court declined to correct the instruction.

The jury returned verdicts of not guilty as to the murder and attempted murder counts, but found petitioner guilty of felonious assault.

Following receipt of the verdicts, petitioner timely moved the trial court, in the alternative, for judgment of acquittal and for a new trial. The grounds for the motions were that self-defense was the basis for the murder acquittal finding an innocent *mens rea* which must be transferred to Dodson's and Oberschlake's injuries, rendering the verdicts inconsistent; that the regardless-of-purpose provision in the criminal intent aspect of felonious assault denied to petitioner due process of law vested by the Fourteenth Amendment as a burden shift from the state to the petitioner on his plea of self-defense; and the misconduct of the prosecutor in closing

argument, including petitioner's right to remain silent and to consult with counsel commentary, together with other comment, was designed to prejudice petitioner and deny to him his constitutional right of fair trial. The trial court denied petitioner's motions.

Petitioner was sentenced to not less than three nor more than fifteen years in the Ohio State Penitentiary on each count, sentences to be consecutive.

From the judgments and sentence of the trial court, petitioner pursued his appeal before the state appellate court. Petitioner again raised the issue that the trial court's denial of petitioner's motion for mistrial and motions for acquittal and new trial based upon prosecutorial misconduct denied to petitioner rights vested to him by the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States as a denial of fair trial, including impermissible comment on petitioner's right to remain silent and to consult with counsel. He further raised the issue of the trial court's erroneous instruction to the jury imposing upon petitioner the burden of establishing self-defense by a preponderance of evidence and that the criminal intent aspect of felonious assault, instructing the jury to disregard the purpose for petitioner's conduct, shifted the burden of proof from the state to petitioner, as timely raised by petitioner at trial and by motion which denied to petitioner due process of law vested to him by the Fifth and Fourteenth Amendments of the Constitution of the United States. The final issue raised and pursued here was the denial of due process in petitioner's conviction for felonious assault as being inconsistent with the verdict of acquittal for murder where the innocent criminal intent of self-

defense on the murder charge was transferred, and must be applied, to the felonious assault charge.

The foregoing issues were presented to the Supreme Court of Ohio; however, that court declined to accept jurisdiction of the appeal.

———o———

REASONS FOR GRANTING THE WRIT

Petitioner seeks a review by this Court to safeguard petitioner's right to fair trial within due process concepts within the state court criminal justice system to impose restraints upon the prosecutorial misconduct here by establishing constitutional guidelines for the conduct of prosecutors in state criminal prosecutions.

Petitioner further seeks pronouncement by this Court of the constitutional standard of due process applicable in the circumstances of this case involving Ohio's felonious assault statute's application of a criminal culpability standard directing a jury to disregard the petitioner's purpose, in which such purpose is central to and the essence of his self-defense conduct thereby transferring the burden of proof imposed upon the state to the petitioner who must then overcome the disability of the irreconcilable conflict between the *mens rea* element of the felonious assault crime and the defense of self-defense.

Thirdly, petitioner seeks review of his denial of fundamental due process in a state court criminal proceeding in the inconsistent verdicts of acquittal of murder and guilt of felonious assault in which the self-defense

which is recognized as to the murder charge is disregarded in consideration of the offense of felonious assault in which that assault is the same conduct of defending one's self and for which the innocent *mens rea* must of necessity be transferred from one to the other offense.

———o———

ARGUMENT

I.

Whether the conduct of a Prosecuting Attorney constitutes misconduct denying the Petitioner his right to fair trial repugnant to the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, where, in closing argument before a jury, comment is made on the Petitioner's exercise of his Fifth and Sixth Amendment rights and comment on matters which were not evidence in the case and which was designed to prejudice Petitioner.

The comments of the prosecutor presented to the jury during closing arguments were not isolated but were a stream of innuendo, statements unsupported by evidence, testimony by the prosecutor and improper comment on the petitioner's exercise of constitutional privileges. The statements of the prosecutor were calculated to invite the jury to conclude that the crime scene had been altered during a 25-minute period, based upon the prosecutor's superior knowledge to that of the jury, and, thus, he sought the jury's conclusion that the petitioner was manufacturing his plea of self-defense. Those com-

ments reached all phases of the jury's consideration of the petitioner's conduct, thus reaching the issue of the felonious assault crime.

The prosecutor's argument to the jury was designed to deprive petitioner of his right of fair trial contained within the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. This Court set the standard in *Berger v. United States*, 295 U. S. 78, 88 (1935), holding that where a prosecutor invites the jury to conclude some matter pretended to be within the knowledge of the prosecutor, which is inherently unfair, the rule of law clearly present is that such conduct is an improper method calculated to produce a wrongful conviction based upon the jurors' confidence that the prosecutor will discharge his obligations faithfully. Such improper suggestions and assertions of personal knowledge carry much weight against the accused when they properly should carry none. Unfortunately, the state appellate court while tacitly finding error prejudicial to the petitioner vainly attempted to bifurcate the case into compartments pertaining to the crime of murder and to the crimes of felonious assault without regard to the fundamental principle that the prejudice to the petitioner is so highly probable that its non-existence cannot be assumed, and where the conduct is pronounced and persistent, with a probable cumulative effect upon the jury, it cannot be disregarded as inconsequential and the accused has been stripped of his constitutional right to due process of law. *Berger v. United States, supra,* 89.

The prosecutor's comments suggesting what the petitioner should have said to the Sheriff's dispatcher are of similar import to a prosecutor's statement: "Why didn't

the accused tell the police that the prescription was good" found to be constitutionally impermissible by the Supreme Court of Ohio. *State v. Stephens,* 24 Ohio St. 2d 76, 263 N.E.2d 773, 774 (1970). Of like effect is *United States v. Brinson,* 411 F.2d 1057 (6th Cir., 1969), holding that cross-examination of a defendant was plain error affecting a substantial constitutional right where the prosecutor posed questions as to whether the accused had discussed his asserted defense with any prosecuting agent or law enforcement officer; and *United States v. Nolan,* 416 F.2d 588 (10th Cir., 1969), holding that a prosecutor's closing argument to a jury was plain error where he commented on the accused's failure to make exculpatory statements to police when arrested.

The prosecutor's comments concerning giving the petitioner a medal for being a lousy shot and if they acquitted him he should be elected sheriff had been previously determined to constitute a constitutional denial of fair trial by Ohio appellate courts in *State v. Agner,* 30 Ohio App. 2d 96, 283 N.E.2d 443 (1972); *State v. Muskin,* 158 Ohio St. 276, 109 N.E.2d 15 (1952); and *State v. Hill,* 52 Ohio App.2d 393, 370 N.E.2d 775 (1977).

The Court of Appeals in the instant case erroneously applied Ohio's contemporaneous objection rule, in part, in disregard for the application of the plain error rule. Prosecutorial comment on petitioner's exercise of constitutional privilege is indistinguishable from comments requiring the application of the plain error rule in *United States v. Nolan, supra; United States v. Brinson, supra;* and as applied by the Ohio Supreme Court in *State v. Hill, supra;* and in which it was the duty of the trial court to

interpose and admonish counsel, *State v. Thayer,* 124 Ohio 1, 176 N.E.2d 656 (1931), for which neither objection nor curative instruction could effectively erase the impact from the jury's mind, *State v. Stevens, supra.*

Statements by the prosecutor that the petitioner didn't report the body in his telephone calls to the police and in petitioner's statements to the police after consultation with counsel didn't answer many questions, were comments made where this petitioner did not testify at his trial. Those comments were governed, as to Fifth Amendment privilege denial, by *Griffin v. California,* 380 U.S. 609 (1965), and as to Sixth Amendment right denial by *Escobedo v. Illinois,* 378 U.S. 478 (1964), coupled with the clear admonition of *Miranda v. Arizona,* 384 U.S. 436 (1966). While the telephone calls to police and statements made to police officers became evidence, they nonetheless did not permit comment on what was not said and did not constitute a waiver of Fifth Amendment privilege where the petitioner elected not to testify at trial. The prosecutor's comments violated petitioner's constitutional privilege and his right to a fair trial.

Petitioner was entitled as a matter of due process of law to a fair trial free from the comments present in this record. A conviction permitted to stand based upon such conduct is constitutionally impermissible.

II.

Whether the felonious assault crime in the State of Ohio, which requires the mental culpability state of "knowingly," defined, in pertinent part, as "regardless of purpose," and as instructed by

the trial court to the jury, mandates that the jury disregard Petitioner's "purpose" in his defense of self-defense, which shifts from the prosecution its burden of proof beyond a reasonable doubt of criminal intent and imposed upon the Petitioner the burden to prove his self-defense beyond a reasonable doubt, or at a minimum by a preponderance of evidence, as to his "purpose" of defending himself, as being repugnant to due process of law vested by the Fifth and Fourteenth Amendments of the Constitution of the United States.

Murder in the state of Ohio imposes the burden of proof upon the state to prove the criminal intent element of "purpose." Section 2903.02, Revised Code of Ohio. Felonious assault in Ohio, to the contrary, imposes the criminal intent element of "knowingly" cause physical harm to another by means of a deadly weapon. Section 2903.11, Revised Code of Ohio.

Section 2901.22, Revised Code of Ohio, sets forth the culpable mental states for each of the aforestated crimes at paragraphs A and B, respectively, in which the intent element of "purpose" does not contain the disability present in the "knowingly" element. *Mens rea* is established upon the finding that a person acts knowingly when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature, *without regard for the purpose* of his conduct. Section 2901.22(B), Revised Code of Ohio.

Self-defense is conduct of a significant purpose in a homicide or assault criminal prosecution. An individual's right of self-defense is found early in the common law

and is a justification for the criminal act. See *Erwin v. State,* 29 Ohio St. 186 (1876), at 194-99, for a discussion of the subject in Ohio by early commentators.

The Ohio Supreme Court in *State v. Robbins,* 58 Ohio St.2d 74, 388 N.E.2d 755 (1979) established the state of Ohio's law on the subject of self-defense. The elements of the defense are that the petitioner was not at fault in creating the situation necessitating defense (which the trial court found as a matter of law); the petitioner believed he was in imminent danger of death or serious bodily harm from which his only means of escape lay in the use of force, although he may have been mistaken as to the existence or imminence of danger; and the petitioner did not violate any duty to retreat from or avoid the danger given the confrontation (in which no duty of retreat was present where petitioner was on his property). *State v. Robbins, supra; State v. Melchior,* 56 Ohio St.2d 15, 381 N.E.2d 195 (1978); *Erwin v. State, supra; Marts v. State,* 26 Ohio St. 162 (1875).

As stated by the state appellate court, the plea of self-defense is a justification for the admitted conduct in which the accused claims exemption from liability where the facts claimed by the prosecution are true. *State v. Poole,* 33 Ohio St.2d 18, 294 N.E.2d 888, at 889 (1973).

The clash thus is presented between Ohio's felonious assault's *mens rea* and the purpose for the conduct, defense of one's self, where the statute requires disregard for that purpose. It is such a set of circumstances that prompted the court in *Isaac v. Engle,* 646 F.2d 1129, 1136 (6th Cir., 1980) to remark concerning Ohio's law on aggravated assault (possessing the same culpable mental

state as felonious assault) that the criminal intent of assault and self-defense are completely irreconcilable, in which the requirement posed upon the accused to establish self-defense is to require him to disprove criminal intent. This Court reversed the Sixth Circuit on the basis that while the respondent there revealed a colorable constitutional claim on the burden of proof issue, the matter was barred because of failure to comply with Ohio's procedure for raising the contention. *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558 (1982). As noted by this Court, Ohio only punishes actions that are voluntary and unlawful. 102 S.Ct., at 1568. Citing *State v. Clifton,* 32 Ohio App.2d 284, 286-87, 290 N.E.2d 921, 923 (1972) this Court recognized the state of Ohio's law that one who kills in self-defense does so without the *mens rea* that otherwise would render the accused culpable of the homicide. 102 S.Ct., at 1568.

It is clear from this Court's pronuncement in *In Re Winship,* 397 U.S. 358, 364 (1970) that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charge, i.e., each element of the offense and essentially that the accused, in Ohio, not only engaged in a voluntary act but did so with the requisite degree of culpability for the specified mental state. Section 2901.21, Revised Code of Ohio.

If the criminal culpability was set from the backdrop of classic *mens rea* to do the act with a criminal mind the issue would not be complex. Here, however, the culpable mental state for Ohio's crime of felonious assault clearly sets out the voluntariness of the act on the basis of awareness by the accused, but becomes constitutionally imper-

missible by requiring that the purpose for which the act is performed must be disregarded where the central, essential issue of self-defense is the purpose for doing the act.

Ohio's felonious assault statute is constitutionally infirm as applied to a self-defense case for the same reason that this Court found the Maine rule requiring the accused charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce the charge to manslaughter where malice aforethought was an essential element of murder under Maine law. *Mullaney v. Wilbur,* 421 U.S. 684 (1975). Petitioner in order to prove self-defense was required not only to establish his plea by a preponderance of evidence but to go further and to negate the criminal culpability mental state for felonious assault, a circumstance he can never establish where Ohio disregards his purpose of self-defense by its position that when he directs fire against assailants, albeit to protect himself, he is aware that his conduct will probably result in injury to his assailants.

Once it was established that petitioner fired the rifle and that two of the assailants sustained wounds from debris the burden of proof shifted from the state to the petitioner requiring him to overcome the deficit, which he could not do where barred by the mandate to disregard his purpose by the mental culpability state of §2903.11, Revised Code of Ohio, and as defined by §2901.22(B), Revised Code of Ohio. As such petitioner was denied due process of law granted to him by the Fourteenth Amendment of the Constitution of the United States.

III.

Whether the verdicts of the jury were inconsistent in the acquittal of Petitioner for the state crime of murder but in finding Petitioner guilty of two counts of the state crime of felonious assault, as a lesser included offense of attempted murder, and repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States, where the evidence established that Petitioner, a property owner, guarding his business property at night, was confronted by three thieves on his property in the dark and, to stop the advance of the three intruders toward Petitioner, he discharged a firearm toward the intruders in which one is killed and the other two receive injury from debris and not gunshot, and the self-defense justification for killing one thief is transferred to the two thieves sustaining injury, as a transferred innocent intent, requiring acquittal following the verdict as to the murder charge.

The rifle fire was directed toward the advancing group to halt the advance. Initially petitioner lost sight of Dodson and Oberschlake and continued to direct fire toward the advancing Osborne. Dodson and Oberschlake were in the path of that fire. They were injured by debris resulting from rifle bullets striking and passing through barrels filled with debris and from bullets striking the ground and spraying debris.

The acquittal of petitioner for the murder of Osborne is based upon petitioner's self-defense which produces an innocent intent in firing the rifle. The innocent intent

transfers and is legal justification for the wounding of Dodson and Oberschlake.

In Ohio the governing legal rule of transferred intent is "if A shoots at B, intending to kill B, but instead the bullet strikes C, then A has committed a criminal act as to C. In such instance, the 'malice follows the blow' and the criminal intent of A to harm B is transferred to C." *State v. Clifton,* 32 Ohio App.2d 284, 290 N.E.2d 921, 923 (1972). Where petitioner had no criminal intent with respect to Osborne on the basis of self-defense as found by the jury, the converse of the rule applies with equal force and no criminal intent could exist to be transferred to Dodson and Oberschlake, "the essential *mens rea* being impossible of proof." *State v. Clifton,* 290 N.E.2d, at 923. The absence of *mens rea* as to Osborne is transferred to and becomes an absent *mens rea* as to the felonious assault crimes.

The verdict of acquittal for murder is inconsistent with the verdict of guilt for felonious assault where all injury sustained for the felonious assault crimes was the product of fire directed to Osborne.

The verdict of guilt present here on the inconsistency of verdicts denies to this petitioner due process of law granted to him by the Fourteenth Amendment of the Constitution of the United States. It is as constitutionally repugnant to convict an accused on a charge for which he was never tried as upon a charge that was never made. *Cole v. Arkansas,* 333 U.S. 196, 201 (1948); cf. *Gregory v. City of Chicago,* 394 U.S. 111 (1969).

CONCLUSION

For the reasons set forth, certiorari should be granted.

Respectfully submitted,

ANDREW B. DENNISON
200 Main Street
Batavia, Ohio 45103
(513) 732-6800

Attorney for Petitioner

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

1984 TERM

No. 83-1702

THE STATE OF OHIO,
City of Columbus,
State of Ohio,

Appellee,

vs.

John E. Coyne,

Appellant.

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Clermont County

(Filed April 4, 1984)

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Andrew B. Dennison.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

.....Deputy

APPENDIX B

THE SUPREME COURT OF OHIO

1984 TERM

No. 83-1702

THE STATE OF OHIO,
City of Columbus,
State of Ohio,

Appellee,

vs.

John E. Coyne,

Appellant.

APPEAL FROM THE COURT OF APPEALS
for Clermont County

(Filed April 4, 1984)

This cause, here on appeal as of right from the Court of Appeals for Clermont County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Clermont County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

.....Deputy

APPENDIX C

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY, OHIO

Case No. CA 1154

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JOHN E. COYNE,

Defendant-Appellant.

MEMORANDUM DECISION AND
JUDGMENT ENTRY

(Filed September 30, 1983)

George E. Pattison, Prosecuting Attorney, 462 Main Street, Batavia, Ohio 45103, for Plaintiff-Appellee.

Andrew B. Dennison, 200 Main Street, Batavia, Ohio 45103, for Defendant-Appellant.

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Clermont County, Ohio, transcript of proceedings, briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App. R. 12(A) as follows:

Between 6:30 and 7:00 P.M. on the evening of August 27, 1981, Philip Osborne, age 18, drove to the home of an older man identified only as "Walter." Beside him on

the front seat of his green 1971 Chrysler Newport were Leslie Oberschlake and Anthony Dodson, both age 16. The three had been working on Osborne's car most of the preceding afternoon and, after buying gasoline for the car and making a few other stops, arrived at Walter's mobile home located in Nicholsville, Ohio. Osborne, Oberschlake, and Dodson remained at the mobile home until approximately midnight, watching television, smoking marijuana, and drinking Little Kings Ale with Walter and his adult son.

When they left Walter and his son, the three boys were, in the words of Dodson, "looking for something to do." It was too early to go home, especially as the night was in part a celebration of Dodson's and Osborne's birthdays. A collective decision was made to venture to appellant John Coyne's junkyard to steal some radiators, some batteries and a spare tire for Osborne's car. They each had another bottle of ale and smoked more marijuana on the way.

The Boot Hill Auto Graveyard, owned and operated by appellant John Coyne, is located on sixty (60) acres of land fronting on Twelve Mile Road in Clermont County, Ohio. Osborne parked the Chrysler on a gravel lane across the road from the east gate of the junkyard, facing it toward the main road to facilitate escape. The doors and trunk of the car were left open. It was a warm, sticky, night without moon or stars. The gravel underfoot was moist and pliable; it had been drizzling rain most of the night and most of the previous day. Wisps of fog were present in the area where the car was parked, which was at the bottom of a slope rising toward the east gate of Boot Hill. There were no lights on in the junkyard.

Osborne led the way as the trio crossed Twelve Mile Road and crawled under the east gate. Having worked part-time for Coyne for about a week in the past, Osborne was able to thread his way through the blackness and piles of salvage to where the batteries and radiators were piled near the office. Dodson and Oberschlake, who had never been to Boot Hill before, followed. Working quickly, the boys made three or four trips from the east gate to the office area and back carrying batteries and radiators, stacking them just outside the gate. The salvage parts were then carried across the road and loaded into the Chrysler: batteries in the trunk, radiators piled in the back seat.

One final item remained to be stolen: the spare tire for Osborne's car. At approximately 12:30 A.M. on August 28, 1981, the boys crossed Twelve Mile Road to make a second trip into the junkyard. As before, Osborne was in the lead, followed closely by Oberschlake and Dodson. They were not carrying lights or weapons of any kind.

Appellant John Coyne was no stranger to theft. His business had been victimized by repeated thefts for years, the last occurring two (2) months prior to August 28, 1981. Some of these incidents he had reported to the police; others he had not. In almost all of the cases in which the police had been called, the culprits had not been apprehended. Coyne had tried illuminating the junkyard at night, and tried hiring night watchmen, but the thievery continued. It was almost as if he was being watched. The incidents always seemed to occur when the appellant had left for the day, despite his irregular hours. In fact, Coyne suspected that certain persons living near Boot

Hill were responsible due to their proximity to the junkyard and resultant ability to monitor his comings and goings.

Driven by his admitted "paranoia" about thefts of his business property, John Coyne had taken to returning to Boot Hill after supper and sleeping there, hoping to apprehend persons attempting to steal from him. His bed consisted of a mattress placed in the back of a junked "Dolly Madison" truck located a short distance from his office, where he kept valuable tools and radios. These were the items Coyne was most concerned about losing. The Dolly Madison truck also contained a number of guns and ammunition, including a Heckler and Koch .308 caliber semi-automatic rifle and a Mauser .380 caliber automatic pistol. Appellant stated that he had been sleeping in the back of the truck guarding his property every night since the last theft had occurred.

In the early morning of August 28, John Coyne was wakened by the sound of a foot on gravel. He thought he heard muffled voices. A car door slammed in the direction of the east gate of the junkyard. As quietly as possible, appellant pulled himself from the Dolly Madison truck and dressed. After placing the .380 caliber pistol in his pocket, Coyne picked up a flashlight and the Heckler and Koch semi-automatic rifle and cautiously went to investigate. He was unsure of the position of the person or persons who had awakened him, or the stage of their activities. He could have heard them as they were either entering or leaving the salvage yard.

Appellant made his way to the office, where his valuable tools and equipment were kept, and shined his light through the window. He checked the recently replaced

lock on the door. Nothing appeared to be out of order. Satisfied that his office was secure, appellant shut off the light lest he be rendered an easy target for whoever might yet be in the junkyard. Coyne began to walk slowly toward the east gate, where he heard the voices and the car door.

After walking an undetermined distance in the murky blackness, appellant saw three figures coming toward him. It was too dark to determine if they were armed, or even if they were only three in number. Appellant states that he fired a warning shot with the rifle over the heads of the figures, and uttered words to the effect of "stop" or "hold it there." When the lead figure continued to advance, appellant lowered the rifle and began to fire with the purpose of defending himself from impending attack. Coyne fired nine more rounds from this position, wounding the leader, Osborne, in the shoulder. Appellant then, according to the evidence below, advanced some thirty-two (32) feet, passing the wounded Osborne, and fired the rifle ten more times in the direction of the east gate. After firing the second burst which had exhausted the rifle, appellant drew the Mouser (sic) pistol from his pocket and circled backward through a maze of salvage. At this point Coyne again came upon Osborne, who was continuing to advance toward him. Appellant fired the Mouser (sic) once, fatally wounding Osborne in the chest.

Dodson and Oberschlake testified that they had seen no one and heard no warnings before the first series of shots was fired. After initially diving for cover, both got up and ran toward the east gate of the junkyard. Although each received shrapnel wounds from the rifle fire, neither had been directly hit by Coyne's bullets. They

met outside the gate and returned to Osborne's car. After waiting in the car for a period of time, they elected to visit nearby houses in search of aid. The first house they tried was vacant, but at the second their knock was answered by a voice from an upstairs window. Sandy Weiner saw the two injured persons lying on her front porch and called the New Richmond Police Department.

Meanwhile, John Coyne was concerned about the other two shadows he had seen in the junkyard. He slid underneath the fence at the east gate and discovered Osborne's car, which featured the fresh blood of Oberschlake and Dodson, as well as the stolen batteries and radiators. Coyne cautiously slid back under the gate, unlocked his office, and telephoned the Clermont County Sheriff's Department to report a breaking and entering. Appellant also telephoned his attorney. It was approximately 12:50 A.M.

Coyne then returned to the area in which the shooting took place and continued to search. He felt sure the other two were still in the vicinity of the east gate. Appellant then heard Dodson and Oberschlake pounding on Weiner's front door. Still carrying the rifle and the flashlight, Coyne found the two wounded boys on the porch. He flashed the light in their eyes and advised them not to move on threat of death. After ascertaining that Dodson and Oberschlake were no longer dangerous to him, appellant returned to his office and telephoned the sheriff's office again to advise that there had been shootings and to request a life squad. It was approximately 1:04 A.M.

As a result of his encounter with appellant, Anthony Dodson received a compound fracture of his right ankle and numerous small wounds to the back and front of his

torso and to his arms and legs. Metal fragments were found in his left arm, his legs, his chest, and his back. He spent sixteen (16) days in the hospital recovering from the injuries above. Leslie Oberschlake received multiple lacerations to his face and scalp, two wounds to his left big toe, and a large laceration to his right knee. Metal was found imbedded in his scalp. Oberschlake was hospitalized for eight (8) days. Dodson and Oberschlake were both found guilty of theft offenses in juvenile court. Philip Osborne was pronounced dead on the scene, having sustained two gunshot wounds, one in the upper right arm and one in the chest.

On September 10, 1981, appellant John Coyne was indicted by the Grand Judy of Clermont County, Ohio, on one count of murder (count one) and two counts of attempted murder (counts two and three). A trial by jury was commenced on February 11, 1982, and completed on February 23, 1982. On February 25, 1982, the jury announced its verdict, finding appellant not guilty of murder and not guilty of attempted murder, but guilty of felonious assault (R. C. 2903.11) as to counts two and three. On April 12, 1982, appellant was sentenced to be confined in the Ohio State Penitentiary for not less than three (3) nor more than fifteen (15) years for each conviction, the sentences to be served consecutively. Execution of the sentencing order was stayed pending appellate review.

Appellant presents the following four assignments of error:

FIRST ASSIGNMENT OF ERROR:

The Trial Court erred to the prejudice of the defendant-appellant by denying his motion for mis-

trial based upon prescutorial misconduct in closing argument, and thereafter denying his motion for new trial based upon that misconduct, which denied to defendant his rights vested by the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States resulting in the denial of a fair trial.

SECOND ASSIGNMENT OF ERROR:

The Trial Court erred to the prejudice of the defendant-appellant by instructing the jury that the defendant must prove his claim of self-defense by a preponderance of the evidence and by instructing the jury that one of the essential elements of the crime of felonious assault: to do the act knowingly; was defined as being aware that the conduct will probably cause a certain result, "regardless of his purpose," in which the central issue of the case was whether defendant's purpose was self-defense, and as subsequently raised and denied in his motion for judgment of acquittal, and alternatively, new trial, in which such instructions altered the burden of proof imposed upon the state of beyond reasonable doubt, thereby denying to defendant his right of due process of law vested by the Fifth and Fourteenth Amendments of the Constitution of the United States.

THIRD ASSIGNMENT OF ERROR:

The trial court erred to the prejudice of the defendant-appellant by denying his motion for judgment of acquittal made at the close of the state's case in chief and as made and renewed following the verdict, where the state's evidence established that the defendant's conduct was justified by law as to each and every offense, and the respective lesser included offenses, and the verdict and sentence must be set aside.

FOURTH ASSIGNMENT OF ERROR:

> The verdict of the jury finding the defendant guilty of two counts of felonious assault is not sustained by sufficient evidence, the verdicts of the jury are contrary and inconsistent verdicts and as such are contrary to law.

Appellant's first assignment of error asserts prejudicial prosecutorial misconduct on the part of the State of Ohio. The statements objected to occurred during closing argument and concern appellant's failure to contact the Clermont County Sheriff's Department until approximately twenty-five (25) minutes after he had shot Philip Osborne. The prosecutor stated that someone who had killed another in self-defense would immediately "run to the phone and say 'Oh my God I shot somebody. They were coming at me. They were attacking me.' " The prosecutor further stated that he suspected that Coyne was thinking about getting rid of Osborne's body during the twenty-five (25) minute period, and that Coyne might have used the twenty-five (25) minutes to rearrange the scene of the shootings. Appellant in his brief refers to other allegedly inflammatory and prejudicial statements made during closing argument, but these statements were not specifically objected to below, and appellant has therefore waived his right to appeal the propriety of these statements. App. R. 12(A).

A prosecuting attorney, as an agent of the people of the State of Ohio, has a duty to pursue conviction of persons guilty of crimes against the State with all appropriate zeal. *State v. Morris* (1954), 100 Ohio App. 307, 136 N.E.2d 653. However, arguments to the jury must be confined to reasonable inferences which may be drawn from evidence presented. *Morris, supra.* Control of the

arguments of counsel rests within the sound discretion of the trial judge, *State v. Pustare* (1973), 33 Ohio Ap. (sic) 2d 305, 295 N.E.2d 210, and advocates have traditionally been allowed great latitude in this respect. *See Morris, supra,* and *Pustare, supra.*

We feel that the statements made by the prosecutor and objected to below are dangerously close to reversible error. Such remarks constitute potentially inflammatory inferences which could not reasonably have been drawn from the evidence below. *See Morris, supra.* There was virtually no evidence presented indicating that the scene of the shooting had been tampered with by anyone, including appellant, or that appellant delayed contacting the sheriff due to any improper motive or intention.

However, all of the remarks by the prosecutor objected to below relate to appellant's conduct after shooting the deceased, Philip Osborne. As appellant was not found guilty of any wrongdoing with regard to Osborne's death, we conclude that the remarks were not prejudicial to appellant. We therefore decline to reverse the verdict below on the basis of such remarks. *See Ramey v. Mets* (1964), 3 Ohio App. 2d 329, 210 N.E.2d 449. Appellant's first assignment of error is therefore not well taken.

Appellant, in his second assignment of error, asserts that the effect of certain jury instructions given below was to require him to disprove an element of the crime with which he was charged in order to prove self-defense. We do not agree.

In a criminal prosecution, the State has the burden of proving each and every element of the offense with which the accused is charged beyond a reasonable doubt.

In re Winship (1970), 397 U.S. 358, 90 S.Ct. 1068; *Glenn v. Dallman* (6th Cir. 1982), 686 F.2d 418. If the defendant asserts an affirmative defense, the State may require the defendant to prove such defense by a preponderance of the evidence. R. C. 2901.05(A). *See also, Krzeminski v. Perini* (6th Cir. 1980), 614 F.2d 121, *cert. denied* 449 U.S. 866, 101 S.Ct. 199. However, the State may not presume that an element of a certain crime exists and then place the burden of showing otherwise on the defendant. *Krzeminski, supra.*

The crime of felonious assault is defined in R. C. 2903.11 as follows:

> (A) No person shall knowingly:
>
> (1) Cause serious physical harm to another;
>
> (2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance . . . .
>
> (B) Whoever violates this section is guilty of felonious assault, a felony of the second degree. . . .

The required mental state for the crime of felonious assault, "knowingly," is defined in R. C. 2901.22(B) as follows:

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

In the case *sub judice,* the instruction which defined "knowingly" contained that statutory language set forth.

By asserting the affirmative defense of self-defense, appellant states in effect that there is justification for his admitted conduct. *See State v. Poole* (1973), 33 Ohio St. 2d 18, 294 N.E.2d 888. The defense is construed as an independent matter "which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true." *Poole, supra,* at 19, 294 N.E.2d 15 889, *citing,* 1 Wharton's Criminal Evidence 54-55, Section 19 (12th Ed. 1955). To establish the defense of self-defense in Ohio, the defendant must show (1) that he was not at fault in creating the situation requiring him to defend himself, (2) that he believed he was in imminent danger of death or serious bodily harm, and that the only means of escape from such danger lay in the use of force, and (3) that he did not violate any duty to retreat from or avoid the danger. *State v. Robbins* (1979), 58 Ohio St. 2d 74, 388 N.E.2d 755.

Pleading and proving self-defense does not, as argued by appellant in his brief, require the negation of any of the elements of felonious assault. Appellant asserts that in order to prove self-defense he was required to disprove the "knowingly" element of the crime of felonious assault (R. C. 2903.11). He urges that because the definition of knowingly contains the language "regardless of his purpose," the burden of proof as to mental state shifts to a defendant attempting to plead self-defense, because such defendant is then required to prove that there *was* a purpose for his conduct, *i.e.* to protect his person. We do not find appellant's argument persuasive for two reasons. First, in order to prove self-defense, the accused is not required to state the purpose behind his actions. *See Robbins, supra.* Second, even assuming *arguendo* that

proof of purpose is required in order to assert the defense of self-defense, the mental state required for felonious assault, "knowingly," is defined by statute in terms of conduct *regardless of purpose*. R. C. 2901.22(B), *supra*. If no purpose need be proven to obtain a conviction for felonious assault under R. C. 2903.11, requiring purpose to be proved to establish self-defense would not require the negation of an element of felonious assault, and could not be construed to violate appellant's right to due process of law.

Therefore, the jury was properly instructed below, and appellant's second assignment of error is overruled.

Appellant's third assignment of error takes issue with the refusal of the court below to grant appellant's motions for acquittal made at the close of the State's case in chief and following the verdict.

A motion for acquittal must be denied if it appears that "reasonable minds may reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St. 2d 261, 263, 381 N.E.2d 184, 185. *See also, State v. Brown* (1981), 3 Ohio App. 3d 131, 443 N.E.2d 1382. Applying the standard above to the case *sub judice,* we find considerable controversy in the record with regard to a number of material elements of the crimes with which appellant was charged. For example, there is conflicting evidence as to whether or not appellant fired a warning shot before firing directly upon Osborne, Oberschlake, and Dodson. This factual dispute bears heavily on Coyne's mental state at the time of the shooting. The record also contains evidence indicating that appellant pursued Oberschlake and Dodson as they

fled from the junkyard following the first ten (10) rounds of rifle fire. Such conduct is inconsistent with appellant's claims of self-defense and defense of his property.

Therefore, being unable to find that a reasonable jury could only render a verdict in favor of appellant at the time his motions for acquittal were made, we must overrule appellant's third assignment of error.

In his fourth assignment of error, appellant contends that the verdict rendered below finding him guilty of two counts of felonious assault is not sustained by sufficient evidence, and that the verdicts finding him not guilty as to the death of Osborne, yet guilty of felonious assault upon Oberschlake and Dodson, are inconsistent and therefore contrary to law.

The crime of felonious assault (R. C. 2903.11) requires that the accused (1) knowingly, (2) cause physical harm to another by use of a deadly weapon. We find that there was sufficient competent credible evidence presented below going to each of the elements of the offense from which a jury could reasonably conclude that appellant was guilty beyond a reasonable doubt of each count of felonious assault. Therefore, we decline to reverse the convictions below on the basis that they are contrary to the manifest weight of the evidence. *See State v. Eley* (1978), 56 Ohio St. 2d 169, 383 N.E.2d 132.

We also find appellant's assertion that the verdicts rendered in the instant case are inconsistent with each other unconvincing. Inconsistent verdicts with respect to separate charges against a single defendant do not constitute grounds for setting the decision of the jury aside. *Harris v. Rivera* (1981), 454 U.S. 339, 102 S.Ct. 460.

Further, we think that the evidence presented supports the verdicts that were rendered. The jury could reasonably have found that appellant was acting in self-defense when he killed Osborne, who was leading the excursion into the junkyard, but was not acting in self-defense and using unjustified force as he continued to fire upon Dodson and Oberschlake as they ran from the scene of the confrontation.

Therefore, appellant's fourth assignment of error is not well taken.

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Clermont County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

HENRICKSON, P.J., JONES and COOK, J.J.

Judge Robert E. Cook, of the Eleventh Appellate District, sitting by assignment of the Supreme Court of Ohio.

APPENDIX D

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

Case No. 81-CR-5282

STATE OF OHIO,

Plaintiff,

vs.

JOHN COYNE,

Defendant.

JUDGMENT ENTRY ON JURY VERDICT
(Filed March 2, 1982)

This cause came on for trial before the Court of Common Pleas of Clermont Couty, Ohio on the 11th. day of February, 1982, and the Defendant appeared in open court represented by counsel, Andrew Dennison, and the State of Ohio represented by Assistant Prosecutors, Jeffrey S. Schwartz and Richard P. Ferenc. A jury was duly empaneled and sworn, whereupon evidence was presented to the jury and upon conclusion of all the evidence on February 23, 1982, the Court instructed the jury as to the law applicable to the charges against the Defendant, to-wit: Count 1: Murder in violation of Section 2903.02; Count 2: Attempted Murder in Violation of Sections 2923.02 and 2903.02(A) and Count 3: Attempted Murder in violation of Sections 2923.03 and 2093.02(A), and the jury retired to the jury room to deliberate, and after due deliberations on the 25th. day of February, 1982, the jury returned to the Courtroom with their verdict signed by all twelve members of the jury, which verdict was a jury verdict

finding the Defendant, John Coyne, not guilty of the offense of murder in Count No. 1 of the indictment; not guilty of the offense of attempted murder in Count No. 2 of the indictment but guilty of the lesser included offense of felonious assault, contrary to and in violation of Section 2903.11 of the Ohio Revised Code a second degree felony; and not guilty of the offense of attempted murder in Count No. 3 of the indictment, but guilty of the lesser included offense of felonious assault, contrary to and in violation of Section 2903.11 of the Ohio Revised Code, a second degree felony.

On the verdict of the jury the Court does hereby find the Defendant not guilty of the offense of murder in Count No. 1 of the indictment; guilty of the lesser included offense of felonious assault, contrary to and in violation of Section 2903.11 of the Ohio Revised Code, a second degree felony in Count No. 2 of the indictment and guilty of the offense of felonious assault, contrary to and in violation of Section 2903.11 of the Ohio Revised Code, a second degree felony in Count No. 3 of the indictment.

IT IS THEREFORE ORDERED that pre-sentence investigation report be conducted by the Probation Department, Clermont County, Ohio, and that said report be returned to the Court before sentence, which sentencing shall be set at a later date. Defendant's bond, if any, shall continue on the further condition that the Defendant shall not leave the State of Ohio during the pre-sentence investigation report.

/s/ JOHN L. WATSON
Common Pleas Judge

HAVE SEEN: /s/ JEFFREY SCHWARTZ
Assistant Prosecuting Attorney

APPENDIX E

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

Case No. 81-CR-5282

STATE OF OHIO,

Plaintiff,

vs.

JOHN E. COYNE,

Defendant.

ENTRY DENYING MOTIONS

(Filed April 12, 1982)

This cause came on for hearing on the 29th. day of March, 1982, on the Motions for judgment of acquittal, in in the alternative, motion for new trial, and the Defendant appeared in open court represented by counsel and the State of Ohio represented by the Prosecuting Attorney's Office of Clermont County, Ohio. Evidence was submitted on behalf the Defendant and on behalf the State of Ohio and upon consideration thereof the Court finds said motions not to be well taken;

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that the Motions for judgment or acquittal, and in the alternative, motion for new trial be and hereby is overruled.

Exceptions to the Defendant.

/s/ JOHN L. WATSON

HAVE SEEN: /s/ JEFFREY SCHWARTZ
Assistant Prosecuting Attorney

APPENDIX F

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

Case No. 81-CR-5282

STATE OF OHIO,

Plaintiff,

vs.

JOHN E. COYNE,

Defendant.

ENTRY SENTENCING DEFENDANT

(Filed April 12, 1982)

The Defendant appeared in open court represented by counsel on the 6th. day of April, 1982, the Defendant having heretofore been found guilty by a jury of the offense of felonious assault in Count No. 2 of the indictment, contrary to and in violation of Section 2903.11 of the Ohio Revised Code and guilty of the offense of felonious assault in Count No. 3 of the indictment, contrary to and in violation of Section 2903.11 of the Ohio Revised Code, both felonies of the second degree, and the Defendant being now before the Court for sentencing was inquired of if he has anything to say or any good and sufficient reason why sentence should not be pronounced against him, and the Defendant having no good and sufficient reason why sentence should not be pronounced against him;

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that the Defendant be and hereby is sentenced to confinement in the Ohio State Penitentiary for not less than three years nor more than fifteen years in Count No. 2 of the indictment and for a period of not less

than three years nor more than fifteen years in Count No. 3 of the indictment.

IT IS FURTHER ORDERED that stay of execution of said sentences be and hereby is granted pending appeal, and the Defendant's bond pending appeal is hereby set at $125,000.00, property.

IT IS FURTHER ORDERED that the sentence imposed in Count No. 3 of the indictment shall be served consecutive to the sentence imposed in Count No. 2 of the indictment.

Credit time allowed to Defendant,—days.

The Clerk of Courts of Clermont County, Ohio is hereby appointed Trustee for the purpose of receiving allotments of the Defendant's earnings while confined in said penal institution under the sentence aforesaid, said allotments to be used for the purpose of paying costs in this action.

/s/ JOHN L. WATSON

HAVE SEEN: /s/ JEFFREY SCHWARTZ
Assistant Prosecuting Attorney

APPENDIX G

Fifth Amendment of the Constitution of the United States

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Effective 1791)

Sixth Amendment of the Constitution of the United States

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compusory process for obtaining witnesses in his favor, and to have the Assistance of Counel for his defence.

(Effective 1791)

Fourteenth Amendment of the Constitution of the United States, pertinent provisions

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

* * *

Section 2901.05, Revised Code of Ohio (Burden of Proof).

§ 2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or

imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

HISTORY: 134 v H 511 (Eff 1-1-74); 137 v H 1168 Eff 11-1-78.

Section 2901.21, Revised Code of Ohio (Criminal Liability):

CRIMINAL LIABILITY

§ 2901.21 Requirements for criminal liability.

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or

was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

HISTORY: 134 v H 511. Eff 1-1-74.

* * *

Section 2901.22, Revised Code of Ohio (Culpable mental states.)

§ 2901.22. Culpable mental states.

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is

reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

HISTORY: 134 v H 511. Eff 1-1-74.

* * *

Section 2903.02, Revised Code of Ohio (Murder)

§ 2903.02. Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

HISTORY: 134 v H 511. Eff 1-1-74.

* * *

Section 2903.11, Revised Code of Ohio (Felonious assault.)

§ 2903.11 Felonious assault.

(A) No person shall knowingly:

(1) Cause serious physical harm to another;

(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of felonious assault, a felony of the second degree.

HISTORY: 134 v H 511. Eff 1-1-74.

* * *

Section 2923.02, Revised Code of Ohio (Attempt)

§ 2923.02 Attempt.

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of such offense, or of conspiracy to commit such offense, shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder or murder is a felony of the first degree. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

HISTORY: 134 v H 511. Eff 1-1-74.

* * *

Office-Supreme Court, U.S.
FILED
JUL 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN E. COYNE,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Twelfth Appellate District, Clermont County, Ohio

---

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

GEORGE E. PATTISON
Prosecuting Attorney
Clermont County, Ohio
462 Main Street
Batavia, Ohio 45103
(513) 732-7313

Attorney for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I.

Whether the Petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights under the Constitution of the United States by alleged prosecutorial misconduct in closing argument where Petitioner failed to make timely objection to the purportedly offensive remarks and where all remarks pertained to a single count of murder in a three count indictment for which count of murder Petitioner was acquitted.

II.

Whether the Ohio statute defining the offense of felonious assault, which requires a mental culpability state of "knowingly", combined with a jury instruction on self-defense, shifts the burden of proof in a criminal prosecution and thereby denies Petitioner his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

III.

Whether the verdict of the jury finding Petitioner not guilty of one count of murder but guilty of two counts of felonious assault arising from a single transaction or course of conduct is inconsistent and hence contrary to law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
OPINIONS BELOW	V
JURISDICTION	1
STATEMENT	2
ARGUMENT	7
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:

Dunn v. *United States,* 284 U.S. 390, 76 L.Ed. 356, 52 S. Ct. 189 13

Harris v. *Rivera,* 70 L.Ed. 2d 1129, 530 (1981) 13

Isaac v. *Engle,* 646 Fed. 2d 1129 (1980) 11, 12

Miranda v. *Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 (1966) 8

State v. *Jones,* 47 O. App. 2d 8, 1 O.O. 3d 156 (1975) 13

State v. *Poole,* 33 Ohio St. 2d 18, 62 O.O. 2d 340, 294 N.E. 2d 888 (1973) .....

State v. *Stephens,* 24 Ohio St. 2d 76, 53 O.O. 2d 182 (1970) 7

State v. *Underwood,* 3 Ohio St. 3d 12 (1983) 11

United States v. *Brinson,* 411 Fed. 2d 1057 (1969) 8

United States v. *Dotterweich,* 320 U.S. 277, 88 L. Ed. 48, 64 S. Ct. 134 13

United States v. *McKinney,* 379 Fed. 2d 259 (1967) 9

Page

United States v. *McQueeney*, 674 Fed. 2d 109 (1982) . . 14

United States v. *Nolan*, 416 Fed. 2d 588 (1969) 9, 10

Statutes:

Section 2901.22 (B), Ohio Revised Code 11

Rule 30, Ohio Rules of Criminal Procedure 11

No. 83-1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN E. COYNE,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Twelfth Appellate District, Clermont County, Ohio

---

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

OPINIONS BELOW

The Memorandum Decision and Judgment Entry of the Court of Appeals is set forth in appendix C of the Petitioner's brief. The order of the Supreme Court of Ohio denying Petitioner's Motion for Leave to Appeal from the Court of Appeals for Clermont County is set forth in appendix A of the brief of Petitioner.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1983. The petition for a writ of certiorari was filed on June 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

STATEMENT

The testimony presented at trial indicated that Philip Osborne, age 18, Leslie Oberschlake, age 16, and Anthony Dodson, age 16, spent the afternoon and evening hours of August 27, 1981, together. At approximately 12 midnight Osborne, Oberschlake, and Dodson decided to go to John Coyne's Boot Hill Auto Graveyard located on Twelve Mile Road in Clermont County, Ohio. The boys intended to take some batteries and radiators from the Petitioner's place of business and also hoped to acquire a spare tire for Osborne's automobile.

Osborne parked his car in a gravel lane adjacent to a small creek. The trio then proceeded up an embankment and crawled under what was later identified as the east gate of Boot Hill Auto Graveyard. At the time the boys entered the Petitioner's premises there were no lights on in the junkyard and the night was characterized as a very dark and foggy one. Osborne led the other two boys to the office where they proceeded to take radiators and batteries which were located outside of the office. The boys made approximately four or five trips carrying batteries and radiators from the office to the east gate where these items were stacked. From the east gate the boys then carried the batteries and radiators to Osborne's car where they were loaded in the back seat and trunk. Oberschlake testified that this activity took approximately 15 minutes.

The boys then re-entered the junkyard by the same gate in order to get a spare tire. This final trip into the junkyard took place at approximately 12:30 a.m. on August 28, 1981. As before, Osborne was in the lead followed by Dodson and Oberschlake. At this time, as on the previous trip into the junkyard, none of the three boys carried a weapon of any kind. Unarmed and without a light of any

kind, the trio proceeded up a lane or pathway between some junked automobiles.

Though the boys believed they were alone on the premises, they were not. At the time of the boys first entry into the Boot Hill Auto Graveyard Petitioner, John Coyne, was asleep in a Dolly Madison truck located near his office. In a statement given to police on September 1, 1981, Petitioner stated that he had been sleeping in this truck for approximately two months in order to protect his premises from break-ins and thefts. Coyne kept a Heckler and Koch .308 caliber semi-automatic rifle and a Mauser .380 automatic pistol in the truck with him.

Petitioner related to police that he had been awakened by the sound of footsteps on the gravel at approximately 12:45 a.m. on August 28, 1981. He also stated that he heard what he termed to be muffled voices. The Petitioner then dressed and armed himself with both the pistol and H. and K. rifle and proceeded first to check his office with a flashlight that he was carrying. This inspection revealed that the office had not been broken into and the lock and hasp recently placed were still intact. At this time the Petitioner thought, "I had missed the opportunity of protecting my own property". Petitioner then began to advance in the direction that he thought "the voices had trailed off to". Petitioner stated that he began exploring the eastern side of his junkyard. "I went toward the east, because that is the area I thought I heard the voices trailing off. But, I did not pursue them immediately."

It was apparently at this point that the Petitioner and the three boys crossed paths. Dodson testified that as he and the other two boys were walking up a lane, there occurred what he perceived as an explosion. Dodson stated that he dove behind a barrel and then jumped up and began

running out of the junkyard. Prior to the shooting, Dodson stated that he had seen no one, heard no warnings, and did not even know that anyone else was there. Oberschlake likewise testified that he heard no warning shot prior to the sudden barrage of rifle fire, and that no one had yelled to stop or halt. A police officer, who resided near the junkyard, testified that he heard several gunshots from that area at approximately 12:30 a.m. on August 28, 1981.

At trial a crime scene investigator from the Bureau of Criminal Investigation testified that he later found two separate and distinct shell patterns of an H. and K. .308 semi-automatic indicating that the rifle had been fired in two separate burst some 32 feet apart. The agent opined that the Petitioner had fired one burst from the rifle then pursued the fleeing Oberschlake and Dodson and fired a second burst from the rifle. He further testified that the physical evidence indicated that the Petitioner had fired the first series of ten shots, wounding Osborne in the shoulder and then passing Osborne in the darkness. After moving down the path or lane, the Petitioner fired a second burst of ten shots, then circled back up toward the office and came upon Osborne once again. At that point, the Petitioner fired the fatal pistol shot.

Meanwhile, Dodson and Oberschlake had escaped from the junkyard and returned to Osborne's car. After waiting there for a period of time, the boys walked down the road to a vacant house to seek assistance. The boys next proceeded to the Weiner residence on Twelve Mile Road and advised the residents that they had been shot and needed help. Shortly thereafter, as the boys lay on the porch, they were approached by a man with a flashlight and gun who told them to stay where they were or he would kill them. Though Oberschlake testified that the man who approached

them on the porch of Weiner residence also said that help was on the way, Dodson testified that the man, who was later found to be Petitioner, did not indicate that he had summoned help, nor that help was on the way.

Petitioner told police that after he had shot Osborne with the pistol, he then pursued the other two outside the gate. Petitioner found Osborne's automobile parked by the creek and saw thereon what he characterized as "a two-tone Christmas paint job" referring to the red blood on the green automobile. He then saw the radiators stacked in the car and this was apparently his first actual knowledge that any of his property had been stolen. After finding the two wounded boys at the Weiner residence, Petitioner returned to his junkyard and telephoned his attorney. On his arrival, the attorney asked Petitioner if assistance had been summoned, and the Petitioner indicated that it had not. The attorney then suggested calling the Sheriff's Office and asking for a life squad. Petitioner then did so.

A Clermont County Sheriff's Office Dispatcher testified that at 12:56 a.m. on August 28, 1981, Petitioner called to report an attempted breaking and entering. No mention of a shooting was made at that time. At 1:06 a.m. on the same date, John Coyne again called requesting that a life squad be sent. Though the Petitioner knew that a homicide had occurred, he again made no mention of this fact.

The first police officer to arrive on the scene reached the junkyard at approximately 1:08 a.m. He found the gates opened and all junkyard lights illuminated. Upon his arrival, the police officer was met by Petitioner and his attorney, who had already arrived at the scene. Petitioner and his counsel then pointed out Philip Osborne's body to the officer.

As a consequence of his encounter with the Petitioner, Anthony Dodson sustained a compound fracture of his right ankle and several small wounds on his back and front as well as his arm and legs. X-rays revealed metal fragments in his left arm and the soft tissue of his chest and abdomen as well as his legs and back. Dodson spent a total of 16 days in the hospital to recover from these injuries. Leslie Oberschlake suffered a laceration of the right knee and two wounds to his left big toe. In addition, he sustained multiple facial lacerations and a scalp laceration with metalic material imbedded in his parietal bone. Oberschlake was subsequently hospitalized for a period of eight days. Philip Osborne sustained two gunshot wounds, one in the chest wall and one in the upper right arm. No powder marks were found on either wound, indicating that Osborne had been shot from a distance greater than seven or eight feet. The wound to the shoulder was not considered to be a life threatening one. The pathologist stated that the cause of death was a massive hemorrhage into the chest cavity resulting from a bullet wound through the chest. The pathologist further stated that death would have occurred within five to eight minutes after the gunshot wound to the chest.

ARGUMENT

I.

Whether the Petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights under the Constitution of the United States by alleged prosecutorial misconduct in closing argument where Petitioner failed to make timely objection to the purportedly offensive remarks and where all remarks pertained to a single count of murder in a three count indictment for which count of murder Petitioner was acquitted.

Petitioner asserts that the closing argument of the prosecutor consisted of a stream of innuendo, statements unsupported by evidence, testimony by the prosecutor, and improper comment on the Petitioner's exercise of constitutional privileges. These allegations are unfounded. A review of the record of this case indicates that each point raised by the prosecutor, in closing argument, was based upon facts contained in the record or inferences which could be fairly drawn from such facts. Any evaluation of the prosecutor's remarks must initially be seen in the light of three important points. First, at no time during the prosecutor's closing argument did the Petitioner see fit to interpose an objection to any point. Second, during its charge to the jury, the Court instructed the jury that "evidence does not include the indictment, opening statements, and closing arguments of counsel." Third, attorneys have been traditionally given wide latitude in closing arguments. *State* v. *Stephens,* 24 Ohio St. 2d 76, 53 O.O. 2d 182, (1970).

The Petitioner asserts that his Fifth, Sixth, and Fourteenth Amendment rights were abridged when the prosecutor, during closing argument, made reference to certain

omissions in the statements by Petitioner to police regarding the events which transpired in the late evening hours of August 27, 1981, and the early morning hours of August 28, 1981. Specifically, the Petitioner takes exception to the prosecutor's act of pointing out to the jury that in Petitioner's two phone calls to the Clermont County Sheriff's Office, he did not advise the police that a person had been shot to death on his premises.

Initially, it must be noted that the prosecutor's references to Petitioner's failure to report the slaying of Osborne in either of his two telephone calls to the Sheriff's Office is supported by the record. As noted earlier, Petitioner telephoned the Sheriff's Office at 12:56 a.m. and simply reported an attempted breaking and entering. He did not, at that time, even mention that a shooting had occurred, let alone indicate that a young man had been killed. The second telephone call placed by the Petitioner to the Sheriff's Office occurred at 1:06 a.m. and though the Petitioner did request a life squad there was still no mention of the fatality. It is therefore apparent that each of these facts presented by the prosecutor in his closing argument were documented in the record and that testimony pertaining to these facts had been presented to the jury without any objection by Petitioner.

The cases cited by Petitioner in support of his position are inapposite and can be readily distinguished from the case now before this Court. In *United States* v. *Brinson,* 411 Fed. 2d 1057 (1969), the Sixth Circuit Court of Appeals declared that the failure of a defendant to deny accusations while in *custody* cannot be referred to in evidence as a tacit admission. To support this conclusion the Court cited *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 (1966). In *Miranda,* the United States Supreme Court stated:

> ". . . it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecutor may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

United States v. *McKinney,* 379 Fed. 2d 259 (1967), also involved the use by the prosecution of a tacit omission, or omission by silence of a defendant. In reversing the conviction below, the Court observed that:

> "permitting this omission (by silence) to be received into evidence therefore controvened Appellant's right under the Fifth Amendment to remain silent *when in custody* and accused of a crime."

The Petitioner also cites *United States* v. *Nolan,* 416 Fed. 2d 588 (1969). In *Nolan,* the defendant had been arrested by the FBI for the interstate transportation of a stolen motor vehicle. Upon his arrest, defendant was given his Miranda warnings and made no statement to authorities. At trial, the defendant stated that he had gotten the automobile in California in response to an ad in the newspaper for someone to drive a car to the East Coast, and that he did not know the car was stolen. In closing argument, the federal prosecutor stated that if this account was true, then the normal thing for the defendant to do would have been to say something about it at the time of his arrest. The Court found this remark to be impermissible stating that when the accused was taken into custody he had a right to remain silent.

This brief review of the case as cited by Petitioner reveals that there is a common theme running through each of the four cases. In each of these cases the accused had been placed under arrest and was actually in custody at

the time the tacit admission or omission occurred. Indeed, in *United States* v. *Nolan,* the defendant had actually been given his so called Miranda rights and thereafter elected to make no statement.

It is apparent that these cases do not control the issue which has been raised by the Petitioner. The prosecutor's remarks pertaining to the Petitioner's two telephone calls to the Sheriff's Office and his failure at that time to report a killing on his property constitute a fair comment upon the evidence presented and do not interfere with Petitioner's constitutional privileges. The contact with police during the two phone calls was initiated by Petitioner himself. Petitioner was not under arrest, nor was he in custody. No interrogation occurred and the information that was given was given voluntarily by the Petitioner. If in retrospect it appears that the Petitioner omitted to give certain crucial information in his phone calls, that ommission is certainly fair game for the prosecutor.

II.

Whether the Ohio statute defining the offense of felonious assault, which requires a mental culpability state of "knowingly", combined with a jury instruction on self-defense shifts the burden of proof in a criminal prosecution and thereby denies Petitioner rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

For his second issue, the Petitioner claims that under Ohio law when one is charged with felonious assault. It raises the affirmative defense of self-defense, the burden of proof is shifted to the defendant. This phenomenon occurs, according to Petitioner, because the statutory defini-

tion of "knowingly", the culpable mental state in felonious assault, states, in part, that one acts knowingly ". . . regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." § 2901.22 (B), O.R.C. Since self-defense is purposeful conduct and felonious assault can be committed without regard to one's specific purpose or intent, Petitioner concludes that the mental element of felonious assault somehow vitiates the claim of self-defense. This argument proves unsuccessful for two reasons.

First, the Petitioner did not object to the definition of "knowingly" prior to the time the jury retired to deliberate. Rule 30 of the Ohio Rules of Criminal Procedure states that a party may not assign as error the giving or the failure to give any instructions unless he objects before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. This was not done in the instant cause and the objection which Petitioner seeks to raise at this point must be deemed to have been waived. *State* v. *Underwood,* 3 Ohio St. 3d 12 (1983).

Furthermore, even if one should determine that this claim of error was not waived at trial, the argument advanced by Petitioner is untenable. Petitioner asserts that because the definition of knowingly contains the phrase "regardless of his purpose" that the allocation of the burden of proof has somehow been shifted from the State to the defendant. Yet, this is not the case. In *Isaac* v. *Engle,* 646 Fed. 2d 1129 (1980), a Sixth Circuit Court of Appeals case relied upon by Petitioner, the Court stated that the defense of self-defense does not negate any element of the crime of felonious assault; that is, it does not put into issue any of the elements of the offense. Instead, such an affirmative

defense constitutes a separate issue. This point was expressed very aptly in Judge Lively's dissenting opinion in *Isaac* v. *Engle*. Referring to the Ohio Supreme Court's holding in *State* v. *Poole,* 33 Ohio St. 2d 18, 62 O.O. 2d 340, 294 N.E. 2d 888 (1973), Judge Lively made the following pertinent observation:

> "it (self-defense) is in the nature of a civil plea of confession and avoidance—it admits the facts claimed by the prosecution to establish an offense, but relies on the existence of a separate set of facts or circumstances which the law recognizes as an excuse. When established, this excuse exempts the defendant from liability . . . The jury does not reach a defense of self-defense until it finds that all elements of an offense have been established beyond a reasonable doubt. Thus, there is no impermissible shifting of the State's burden."
> (646 Fed. 2d, 1139)

It is thus apparent that, contrary to Petitioner's argument, the jury is not required to consider both the elements of felonious assault and the elements of self-defense simultaneously. Rather, the jury must first review the evidence in order to ascertain whether each and every element of the charge of felonious assault has been proven beyond a reasonable doubt. This would, of course, include the element of *mens rea*. If, and only if, the jury determines that all elements of the offense of felonious assault have been established by the requisite degree of proof, does the jury then go forward and consider the defendant's claim that he acted in self-defense. Therefore, while the jury does not consider the actor's purpose in determining whether felonious assault has, in fact, been committed, the jury most certainly does consider the actor's purpose or intent in determining whether that felonious assault was justified under the law of self-defense. When viewed in this light, it

is abundantly clear that the mental elements of felonious assault and self-defense do not negate one another and that the combination of the two does not operate to impermissibly shift the burden of proof to the defendant.

III.

Whether the verdict of the jury finding Petitioner not guilty of one count of murder but guilty of two counts of felonious assault arising from a single transaction or course of conduct is inconsistent and hence contrary to law.

Petitioner contends that the verdict of the jury finding him guilty of two counts of felonious assault is contrary to law in that it is purportedly inconsistent with the jury's verdict finding him not guilty of the murder of Philip Osborne. Even assuming, arguendo, that the verdicts were inconsistent, such inconsistency is not sufficient for reversing Petitioner's conviction. In *Harris* v. *Rivera,* —— U.S. ——, 70 L.Ed.2d 530, 535-536, 102 S. Ct. —— (1981), this Honorable Court made the following pertinent observation:

> "inconsistency in a verdict is not a sufficient reason for seting it aside. We have so held with respect to inconsistency between verdicts on separate charges against one Defendant, *Dunn* v. *United States,* 284 U.S. 390, 76 L.Ed. 356, 52 S. Ct. 189, and also with respect to verdicts that treat co-Defendants in a joint trial inconsistently, *United States* v. *Dotterweich,* 320 U.S. 277, 88 L.Ed. 48, 64 S. Ct. 134."

A similar conclusion was reached by an Ohio appellate court in *State v. Jones,* 47 O. App. 2d 8, 1 O.O. 3d 156 (1975). In *Jones,* the accused contended that the jury's verdict finding him guilty of murder, but not guilty of felonious assault on another individual, all occurring in a

single transaction, was not sustained by sufficient evidence and was contrary to law in that it was inconsistent and irregular. The Court of Appeals found this claim of error to be without merit.

> "It is noted that there were two victims and separate crimes charged as to each victim. It does not necessarily follow that intent or lack of intent regarding a crime committed against one victim is transferred to, and becomes the intent, in regard to the crime charged against the other victim. It is possible for a person charged with two separate crimes to have intent or lack of intent as to each of the victims independently of the other." (1 O.O. 3d, 159)

By the same token, it does not necessarily follow that a finding of self-defense regarding a crime committed against one victim is transferred to and becomes a valid justification in regard to crimes charged against other victims. *United States* v. *McQueeney,* 674 Fed. 2d 109 (1982) .

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE E. PATTISON
Prosecuting Attorney
Clermont County, Ohio
June, 1984